STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2005
v	No. 254631 Oakland Circuit Court
ALLEN LESTER BRECHT, Defendant-Appellant.	LC No. 03-192189-FH

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of first-degree home invasion, MCL 750.110a(2). He was sentenced as a third offense habitual offender, MCL 769.11, to thirty months' to forty years' imprisonment, to be served consecutively to his sentence for a parole violation. This case arose when complainant and his cousin investigated a noise in the garage attached to the house, observed defendant leaving the garage through a window, and noted numerous power tools on the ground outside the window. We affirm.

According to a defense witness and casual acquaintance of defendant, defendant arrived at his house on July 9, 2003, between 11:00 p.m., and 11:30 p.m.[1] They used cocaine and played cards until sometime between 1:30 a.m., and 2:00 a.m., when defendant left. Shortly after defendant left, he was arrested. Complainant testified that he was watching television with his wife and cousin when his uncle called his name and said he heard a noise in the garage. He went to investigate and saw a young, six-foot-tall white man wearing a red shirt with the number 23 on it leaving the garage through the window. When he called out to the man, the man dropped the tools and ran. According to complainant's cousin, the uncle called out that someone ran to the alley behind the house; he ran out the door and observed a tall white man wearing a red and black shirt containing the number 23 running from the house. Complainant and his cousin

[1] 11:00 p.m., on July 9, 2003, would have occurred after defendant was arrested because defendant was arrested in the early morning on July 9, 2003. It is not clear whether this was a typographical error, or whether defense counsel misspoke. The witness later indicated that he thought defendant came to visit on June 6, or June 7. However, he maintained that defendant came to visit the night he was arrested.

chased the man until they saw a police officer, who was also a canine handler; they pointed the running man out to the officer.

Officer Strick followed the man in his unmarked car while broadcasting the man's location over the police radio. At one point, he observed the man take off the jersey and run carrying the jersey in his hand; the man was not wearing another shirt. The man turned down an alley; because Strick's unmarked car had no emergency lights or siren, he briefly lost sight of the man when he was detained at a traffic signal. When he arrived at the alley, he waited briefly for the other officers to set up a perimeter; he and his police dog then began to track the man. He identified the man he was chasing as defendant. Officer Williams, one of the officers who helped set up the perimeter, testified that he intercepted defendant and took him in custody; defendant was still carrying the shirt in his hand. Officer Strick and his police dog tracked the man's scent to Officer Williams' patrol car.

Meanwhile, Officer Braden met complainant and his cousin at the house; he noted that the screen was ripped out of the back window of the garage, and wire cutters were on the ground under the window. He collected a snow blower, a chain saw, and other power tools that had been left behind by defendant. He took complainant and his cousin to Detroit to identify the perpetrator. Both witnesses indicated that the first person brought to them was not the perpetrator. Both witnesses then identified defendant at the scene as the perpetrator. However, neither witness could positively identify defendant in a subsequent lineup. Defendant was charged with and bound over on first-degree home invasion, MCL 750a(2). He was convicted as charged; he pleaded to being an habitual offender and was sentenced accordingly.

Defendant first appears to argue that he did not receive a trial by an impartial jury because a comment made by a potential juror tainted the entire venire. We disagree.

A trial court's decision regarding a motion for a mistrial on the ground of juror misconduct is reviewed for an abuse of discretion. *People v Sowders,* 164 Mich App 36, 47; 417 NW2d 78 (1987). However, an unpreserved claim of error is reviewed for plain error affecting a defendant's substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). A defendant has a fundamental right to a trial by an impartial jury. *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981). However, juror misconduct does not automatically require a new trial. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). To warrant a new trial, the misconduct must have infected the impartiality of the jury. *Id.* at 103-104. See also *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998). Although a defendant is denied the right to an impartial jury when a juror removable for cause is permitted to serve on the jury," *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998), the potential juror here was excused. Voir dire functioned exactly as it should have.

> The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. [*People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996).]

Nevertheless, to the extent that the comments could have been considered misconduct, a new trial is not required unless defendant can affirmatively establish that his right to an impartial jury was prejudiced. *Fetterley, supra* at 545. Here, defendant merely states that the "testimony must,

in the very nature of things, [have] had a strikingly emotional impact upon the jury." Because defendant has not presented any indication that the remaining jurors were affected, see for example, *People v Tyburski*, 445 Mich 606, 612, 626-630; 518 NW2d 441 (1994) (jurors affected by substantial pretrial publicity, voir dire focused on qualifying jurors rather than discerning bias, and the court's subtle admonition of those jurors who admitted bias), defendant has failed to affirmatively establish prejudice. A mere possibility of prejudice is insufficient to warrant a new trial. *People v Nick*, 360 Mich 219, 227; 103 NW2d 435 (1960). Moreover, when the trial court intervened in the instant case, the court instructed the jury regarding the presumption of innocence and encouraged the prospective jurors with preconceived notions to inform the court. When a court has instructed a jury not to be improperly influenced by a statement, and there is no indication that jurors paid attention to the statement or were affected by it, it can be assumed that the jury was not improperly influenced. *Nick, supra* at 226, 231-232. Therefore, no prejudice occurred, and a new trial is not warranted.

Defendant next argues that he was denied due process by the improper admission of his prior bad acts.[2] We disagree.

Evidentiary issues are reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). Forfeited error is reviewed under the plain error standard set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, when a right has been intentionally relinquished, the error has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). The statement, "That's why I have been – done so much time already because I have never had a real lawyer," was part of an audiotaped telephone conversation between defendant and his uncle. After the challenged portion of the tape was played, the prosecutor argued and defense counsel acknowledged that defense counsel had reviewed the tape before trial and requested that several statements be redacted, but defense counsel overlooked the challenged statement. This Court has previously found that the improper admission of a statement on an audiotape was not grounds for a mistrial when the defense counsel had access to the transcript of the audiotape before it was played and did not challenge the statement on the tape until after it was played, the statement was brief, and the court instructed the jury to disregard the statement. *People v King*, 215 Mich App 301, 308-309; 544 NW2d 765 (1996).

In the instant case, defense counsel had access to the tape before it was played and did not object until after the statement was made, and the statement was brief. However, the court, after finding the statement somewhat ambiguous because of defendant's prior statement that he did not have an attorney yet, indicated that a jury instruction would simply highlight the statement to the jury; defense counsel agreed. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), citing *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Moreover, improper admission of testimony regarding a defendant's previous convictions can be harmless error in light of the untainted evidence of the defendant's guilt.

[2] Because plaintiff acknowledges that the statement was erroneously admitted, we have not analyzed this issue pursuant to MRE 404(b).

People v Carson, 217 Mich App 801, 806; 558 NW2d 1, vacated 217 Mich App 801, adopted 220 Mich App 662, 678; 560 NW2d 657 (1996).

Given the fact that complainant observed defendant leaving the garage through the window, defendant dropped the items he had taken from the garage and began to run when complainant called to him, complainant and his cousin chased defendant until they saw Officer Strick, they pointed defendant out to Strick who followed defendant to an alley, Strick and his canine tracked defendant through the alley to where Officer Williams had defendant in custody, and complainant and his cousin both identified defendant at the scene as the perpetrator, not to mention the unchallenged portions of the tape in which defendant admitted he was caught breaking into a house, the untainted evidence of defendant's guilt was overwhelming, and reversal is not required.

Defendant next appears to argue that he was prejudiced by the cumulative presentation of his audiotaped admission that he committed the offense.[3] Evidence generally is admissible if it is relevant. MRE 402. Clearly, a defendant's confession is relevant evidence. "'[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *People v Dunn*, 446 Mich 409, 423; 521 NW2d 255 (1994), quoting *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or [if there is] needless presentation of cumulative evidence." MRE 403.

Defendant claims that the constant repetition of his statement had an emotional impact on the jury and interfered with its determination of defendant's guilt or innocence. However, "[r]ule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). As already indicated, a defendant's admission cannot be considered marginally probative. *Dunn, supra* at 423. Moreover, after reviewing the record, we do not find the evidence cumulative. Therefore, defendant has failed to establish plain error. *Carines, supra* at 763. Even if the evidence was cumulative, defendant has failed to demonstrate prejudice.

> [P]rejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, and emotional one. [*People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).]

Defendant does not point to anything with respect to jury deliberations which would lead to the conclusion that prejudice occurred. Instead, defendant merely states, "Such testimony, in its

[3] Defendant fails to cite a single case indicating that cumulative presentation of admissible evidence is prejudicial to the extent that reversal is required.

constant repetition, must have had a strikingly emotional impact upon the jury," without indicating how or why the impact would be emotional. Moreover, the cases cited by defendant involve the introduction of inadmissible or marginally probative evidence, not the cumulative presentation of admissible, highly probative evidence.

With respect to the references made during closing argument, counsel's argument is not evidence. CJI2d 3.5; MCR 6.414(E). Prosecutors are given great leeway in their arguments and may argue the evidence and reasonable inferences therefrom with respect to their theory of the case. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant appears to claim it was error to play the tape again during closing argument. A similar argument with respect to films was made in *People v Mundy,* 63 Mich App 606, 608; 234 NW2d 663 (1975), to which this Court responded:

> Historically, all materials admitted into evidence compose an integral and absolutely necessary part of the case, and both the prosecution and the defendant have an absolute right to use any and all such evidence in final arguments. This is basic to trial procedure. Defendant does argue, however, that films are in a category apart from other types of demonstrative evidence because they have a certain testimonial quality not present in other types of exhibits. This difference, defendant contends, renders improper the use of films during closing argument. We disagree. While this issue has not heretofore been decided by an appellate court in this state, a similar argument has been considered and rejected by the New Mexico Court of Appeals in *State v Orzen,* [493 P2d 768 (NM, 1972)], a decision with which we agree and whose rationale we adopt. We therefore find no error.

Therefore, no error occurred as a result of playing the tape during closing argument. *Mundy, supra* at 608. Because defendant has not otherwise indicated that the prosecutor did anything more than argue the evidence, he has failed to otherwise establish that error occurred. *Bahoda supra* at 282.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood